in which the defendant has placed him, he may recover, although he would not have been harmed if he had remained where he was (*Jones* v. *Boyce*, 1 Stark. 493; *Stokes* v. *Saltonstall*, 13 Pet. 181; *Coulter* v. *Express Co.*, 56 N. Y. 585). In the present case, if the plaintiff had in her fright stepped back from the track to avoid the car, and fallen directly under the wheels of a passing wagon, she would have had a clear case against the defendant.

If the horses in *Mitchell* v. *Rochester St. Ry. Co.* had touched the plaintiff, however slightly, her right to recover for her injuries would have been undoubtedly perfect. No intent is necessary to constitute a battery; negligence and unpermitted contact are enough (*Weaver* v. *Ward*, Hob. 134). Actual impact is not essential to an assault; a putting in fear is sufficient to constitute the wrong. If no intent to strike is necessary to make a battery, why should an intent to put in fear be necessary to make an assault? If the law draws a line here between an assault and a battery, upon what reasoning is the distinction to be supported? The action of assault is not in the nature of a criminal proceeding against the defendant. Why, then, is his intent material? What matters it to the plaintiff whether the defendant intended to commit or negligently committed the act which put the plaintiff in fear of his life?

The authorities upon the subject are few, and unfortunately divided. The earlier New York case of *Lehman* v. *Railroad Co.*, 47 Hun, 355, is cited by the Circuit Court, and distinguished on the ground that no negligence was alleged in the case as it appears in the report. The opinion in that case was short, and there was no statement of reasons for the decision; but certainly the case does not appear to have proceeded on the ground assigned by the Circuit Court. The case in the Privy Council (*Commissioners* v. *Coultas*, 13 App. Cas. 222) is also cited, and its reasoning disapproved. The Irish cases which serve to counterbalance *Commissioners* v. *Coultas* (*Bell* v. *Railway Co.*, 26 L. R. Ir. 428, and *Byrne* v. *Railway Co.*, Court of Appeal, Ireland, unreported) are not noticed by the Court, though the former contains perhaps the best-reasoned discussion of the subject. *Purcell* v. *Railway Co.*, 48 Minn. 134, is directly in point for the plaintiff, unless it be said that the contract duty of the defendant towards the plaintiff influenced the decision. There was a similar duty, indeed, in *Bell* v. *Railway Co.*, though the Irish court does not found its decision upon that fact. In *Mitchell* v. *Rochester St. Ry. Co.*, the court takes pains to point out that no contract duty existed, the plaintiff not having boarded the car. *Fell* v. *Railroad Co.*, 44 Fed. Rep. 248, and *Stutz* v. *Railroad Co.*, 73 Wis. 147, while distinguishable, tend strongly to uphold the plaintiff's contention. The whole subject is discussed, and a conclusion reached favorable to the plaintiff's recovery, in Beven on Negligence, 66, 2 Sedgwick on Damages, 8th ed., 643, and 1 Sutherland on Damages, 2d ed., 44.

THE RULE IN DEARLE *v.* HALL. — In the important case of *Dearle* v. *Hall*, 3 Russ. 1, it was held that if the second assignee for value of an equitable interest gave notice of his claim to the trustee after inquiry as to incumbrances, and the first assignee gave no such notice, the second assignee thereby obtained a priority in favor of his equity.

The property transferred is a relation, and only gives the assignee a

claim through his assignor. Each assignee then has exactly the same right, viz., a claim against the trustee through the *cestui*, and one is prior. The English court says that the priority is divested by a failure to give notice. This deprivation or priority must arise from the failure to perform some duty. The assignee owes no duty to the assignor, but, on the contrary, may hold his assignor to an obligation; nor does he owe any duty to the trustee, for the latter is protected if he pays the *cestui* without notice of the assignment. The only possible duty, therefore, is a duty to give notice, in order that future purchasers may not part with their money for a valueless claim. The soundness of this view depends on the somewhat questionable hypothesis that the assignee of an equitable interest is bound to anticipate and provide against the rascality of his assignor; and certainly no severe criticism can be passed on those courts which do not adopt the rule (*e. g.*, New York, *Muir v. Schenck*, 3 Hill, 228, and Massachusetts, *Putnam* v. *Story*, 132 Mass. 205). But the English courts in *Foster* v. *Blackstone*, 1 My. & K., affirmed in *Foster* v. *Cockerell*, 3 Cl. & F. 456, extended their principle beyond the limits of this debatable ground into the territory of judicial legislation, and held that the assignee first giving notice obtained the priority, although he had made no inquiry as to previous assignments. However desirable the result, — and that it is desirable appears from its similarity to our registry laws, — the decision must be regarded as unjustifiable from the judicial point of view.

Under these circumstances, the opinion of Lord Macnaghten in the recent case of *Ward* v. *Duncombe*, Appeal Cases [1893], 369, is of the utmost value. The case itself simply amounted to a refusal to extend the rule of *Dearle* v. *Hall* unnecessarily; but Lord Macnaghten's discussion of the subject is the most valuable to be found in the books.

He shows that the reasoning in defence of the rule is vicious. "It has been said that notice is necessary in order to 'perfect' the title of the assignee, in order to 'complete' his title. . . . Notice does not render the title perfect. Notice was not even a step in the title until it was made so by the decision in *Foster* v. *Cockerell*. Apart from the rule in *Dearle* v. *Hall*, an assignee of an equitable interest from a person capable of disposing of it has a perfect equitable title, though the title is no doubt subject to the infirmity which attaches to all equitable titles. And that infirmity is not and cannot be wholly cured or removed by notice to the trustees."

Further, he shows that notice does not "convert" the trustee of the fund into a trustee for the person who gives the notice. Notice fixes a personal liability upon the trustee, but he is just as much a trustee for the persons rightfully entitled before as after notice, though before notice he would be justified in paying the fund to those who appeared to be the true owners. Lord Macnaghten admits that *Dearle* v. *Hall* has the binding force of law, but concludes that "it has on the whole produced at least as much injustice as it has prevented."

The American courts do not in general adopt the rule of *Dearle* v. *Hall*. See Perry on Trusts, vol. i., 2d ed., p. 527, note 1.